

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

April 2004

Testing Protocol

It's an educators favorite time of year,; students chomping at the bit for summer vacation, classrooms heating up to sleep-inducing temperatures, and standardized test booklets waiting anxiously to gauge how effective the teacher has been throughout the year as, apparently, only a standardized test can.

Standardized tests may not be the best measure of individual student progress, but the tests do provide valuable information about baselines of student performance. As such, careful adherence to testing protocol is vital for accurate results.

And educators who actively thwart the protocols can find themselves facing a UPPAC investigation.

The protocols for test administration are simple: keep the tests secure, don't prep students using the test in any manner, and preserve the integrity of a student's answers.

The State Board has a more detailed rule which provides that educators shall not:

Provide students directly or indirectly with specific questions, answers or the subject matter of any specific item on a test;

copy, print or otherwise reproduce testing materials; change, alter or amend a student's answer sheet or other test materials in a way that alters the student's intended response;

use an earlier version of the test to prep students without express permission;

violate any specific test administration procedure or guideline specified in the test administration manual, or violate any state or school district standardized testing policy or procedure; or

knowingly do anything that would inappropriately affect the security, validity, or reliability of standardized test scores of any individual student, class, or school.

The State Office website clarifies these rules with specific examples in its Teacher/Administrator Guidelines at www.usoe. k12.ut.us/eval/bsct/default.htm.

A teacher who is still uncertain about a test preparation strategy should check with the district testing specialist.

Inside this issue:

Professional Prac- 2 tices Case Law

Eye On Legisla- 2 tion

Recent Education 3 Cases

3

UPPAC Member Profile

Your Questions 3



UPPAC Cases of the Month

Sadly, the majority of UPPAC cases involve educators engaged in, or attempting to engage in, sexual activity with students. It should be obvious, but given the rash of new cases involving sexual contact between teachers and students that UPPAC has received, a reminder is in order: **Teachers may not date, kiss, hug, or**

otherwise seek the sexual companionship of their (or anyone else's) students.

Unbelievably, some teachers still don't get it. Even more amazingly, some educators sue their school districts over the consequences of their acts of sexual misconduct with students.

In Arkansas, for in-

stance, a teacher sued after he was convicted of five counts of violation of a minor following his 18-month relationship with a student. Smith v. State, 118 S.W. 3d 542 (2003).

The teacher argued that the state law which made it a felony for a teacher to have sexual

(Continued on page 2)

UPPAC CASES

- The Utah State Board of Education accepted a two year suspension of Walter A. Carmona's license. Mr. Carmona failed to maintain appropriate boundaries with a female student.
- The Professional Practices
 Commission agreed to a one
 year probationary term for
 Harold A. Stone. Mr. Stone
 entered into a 12-month plea
 in abeyance in Eighth District
 Court following an altercation
 with his teenage son.

Eye On Legislation

On the federal front, the U.S. Senate considered a budget resolution in March that would commit \$1 billion each to Title I and IDEA.

While a billion dollars would do wonders for Utah's education budget, it is barely a drop in the bucket for Title I and IDEA.

In fact, as the National School boards Association notes, NCLB anticipates total funding of \$20.5 billion for Title I in 2005. With the \$1 billion the Senate resolved to add to Title 1 funding, the total for 2005 would be \$13.3 billion —a bit shy of the promised amount under NCLB.

Similarly, the \$1 billion earmarked for IDEA would bring the 2005 total to \$11 billion. In order to satisfy the 40 percent funding requirement mandated by IDEA 29 years ago, however, Congress would need \$22 billion.

Also in March, the federal Department of Education announced changes to its rules under Title IX. The department intends to loosen the rules to allow for same sex public schools.

Civil rights and women's organizations have criticized the proposals, citing concerns that the department is moving backward to the "separate but equal" philosophy of the pre-Brown v. Board of Education era.

Locally, Gov. Olene Walker courageously vetoed House Bill 115 Carson Smith Special Needs Scholarship.

The veto was maligned by some Republican legislative leaders, who tried to oversimplify the decision by claiming the governor doesn't care about special needs children. The reality, of course, is that the bill would harm more special needs students than it would help.

Some of those same legislators hope to override the veto and educators are encouraged to contact their local legislators to urge them not to override this important veto.

Recent Education Cases

Florida and Ohio courts recently attempted to clarify the cross-section of student records and personnel files, with conflicting results. In Johnson v. Ostrosky, (Fla. App. 4 Dist. 2004), the court addressed a principal's assertion that she was entitled to an unredacted copy of her superintendent's investigative report. The 8000 (no, that's not a typo) page report documented misconduct by the principal and contained interviews with students. The superintendent, citing con-

cerns that personnel files are subject to open records laws, offered the principal a copy with student identifying information redacted or an unredacted copy if the principal signed a confidentiality agreement. The principal refused both offers.

The court noted that the exceptions to FERPA did not apply in this case and the student information could not be released to the principal without parental consent. In particular, the court held that the

exception allowing records to be disclosed to school officials without parental consent did not apply in this case because the exception is for those officials with a "legitimate educational purpose." The principal did not intend to use the records for educational purposes, but solely for her personal use in her ongoing dispute with the superintendent and the district.

In Ohio, however, a federal dsitrict (Continued on page 3)

UPPAC cases cont.

(Continued from page 1)

contact with a minor (Utah has a similar enhancement provision at U. C. § 76-5-404.1(h)) unconstitutionally discriminated against school employees. According to the teacher's theory, it was unfair that other adults could have sexual contact with students and face only misdemeanor charges while teachers (who have far greater access to students and are in a position of trust) are slapped with a felony.

The court, containing its guffaw,

stated that the distinction was rationally related to the state's very legitimate interest in protecting students from predatory educators.



There should be no question in the minds of Utah educators that they may not suggest, engage in, attempt, or at-

tempt any level of sexual activity with their students or any other mi-

nors. This prohibition includes cyber relationships. UPPAC has taken action against educators who use their computers to either groom students for a relationship or for the more voyeuristic purpose of discussing the intimate details of their students' romantic relationships with other students.

Along that same line, it should also be noted that district computers should not be used for cyber-dating or sending/receiving sexually explicit emails from any source.

Utah State Office of Education Page 2

UPPAC Member Profile—Linda Parkinson

Linda Parkinson is one of two community members on the Professional Practices Commission. She has been heavily involved in public education for at least 25 years.

Ms. Parkinson served first as a volunteer room representative in her oldest daughter's elementary school and moved on to successive levels of leadership in both the Utah and National PTA.

Currently, Linda is the lead secretary at a Title I school in Alpine District. Ms. Parkinson is excited to be part of the students' "lifelong process of learning."

In fact, Ms. Parkinson is a firm believer in, and practitioner of, life-

long learning. Her four children have fond memories of Ms. Parkinson's "learning vacations" and her six grandchildren now report to her what they have learned on their family vacations.



Linda Parkinson

Ms. Parkinson also continues to

learn from her many volunteer activities and intends to head back to school herself this year to complete the degree she began at BYU.

Ms. Parkinson also strives to ensure that all children have the opportunity to grow into lifelong learners. Through her service with the PTA, at her employment and on UPPAC, Ms. Parkinson is doing her part to ensure that all children have "the best education and a safe environment in which every child can meet his full potential."

Your Questions

Q: A homosexual couple wants to participate in the promenade at prom. Traditionally, the promenade is boy/girl and couples are not guaranteed that they will be able to promenade with their date for the evening. Can the school insist on a boy/girl pairing?

A: Maybe, if the school has a rational reason for the boy/girl pairing. Tradition, however, may not be rational enough where the effect is arguably discriminatory.

Students do not have a right to

What do you do when...?

promenade. In this case, only those couples who were in the same grade and both attended the same school were able to promenade together. A junior dating a senior would not walk with her date, nor would a person whose date attended another

high school.

The school could, therefore, argue it was not treating the homosexual students any differently by pairing them with a member of the opposite sex for the promenade where the school has regularly split up couples in the promenade based on grade and school of attendance.

But a classification that distinguishes between students based on grade level has never, in our experience, been ruled invalid by a court.

Recent Cases Cont.

(Continued from page 2)

court ruled that a report regarding a teacher's alleged alleged corporal punishment of students which included witness statements from students was not subject to FERPA. The court determined that an incident report about a teacher is a personnel record, not a student record and, therefore, not governed by FERPA.

The court went on, however, to consider whether disclosure of the records would be consistent with FERPA's policy of protecting student safety. The court ruled that disclosure would not cause harm to the student witnesses.



In another employment action case, a New York appellate court upheld the ability of a

district to terminate an employee for economic reasons.

The employee sued the board of education for discrimination and retaliation after his teaching position was eliminated. The board had decided to transfer the program the educator taught in to save resources. The teacher requested a transfer to another position but was denied because he was not certified in the area and the positions were not similar to his former teaching position. The court ruled that the drafting program was eliminated for legitimate economic reasons and not because of the teacher's age or to retaliate after he filed a grievance. Davis v. School District of City of Niagara Falls, (2004).

Utah State Office of Education Page 3

Utah State Office of Education

250 East 500 South P.O. Box 144200 Salt Lake City, Utah 84114-4200

Phone: 801-538-7830 Fax: 801-538-7768 Email: jhill@usoe.k12.ut.us





The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions Cont.

(Continued from page 3)

Classifications based on sexual orientation, on the other hand, have been found suspect in various courts, including the U.S. Supreme Court.

In order to withstand court scrutiny, a rule that has the effect of treating students differently based on sexual orientation must have a rational basis.

Where the only reason for splitting the couple up is that the promenade is traditionally boygirl, a court may find the discriminatory effect is an unconstitutional burden on the couple.

If tradition is the only reason for the separating a same sex couple in the promenade to the culminating dance of the school year, the school may want to rethink its traditions.

Doing so is especially important

given a recent study by the Gay, Lesbian and Straight Education Network (GLSEN). The study found that more than 80 percent of gay, lesbian, bisexual and transgender middle and high school students have experienced verbal harassment based on their sexual orientation.

School personnel need not support any student's lifestyle choice. But they should support every student's right to a safe, supportive learning environment, even at non-academic but still school-sponsored activities.

Q: An occupational therapist made sexually inappropriate comments to a special education student. What can the State Office do?

A: Very little. The therapist is not a licensed educator, so the State Office cannot look to licensing action against her. She may, however, be licensed through the Division of Occupational and Professional Licensing and the parent could complain there.

The comments were made by a female employee to a male student, so there may be an allegation of sexual harassment, but it is the extremely rare case where one comment rises to the level of "severe, pervasive and objectively offensive" necessary for the student to prevail in an action for sexual harassment.

As with substitutes, classroom aides, classified employees, and volunteers, the State Office does not have jurisdiction over unlicensed people in the schools. Action against those without educator licenses is reserved for the police, the school district and the court of public opinion.